Supreme Court, U. S.
FILED
APR 16 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1979

No.: 79-1632

ANTHONY PROVENZANO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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April 16, 1980

Table of Contents

Opinion Below	1
Jurisdiction	2
Questions Presented	2
Constitutional Provision Involved	2
Statement of the Case	2
The *Brady* Violation.	5
Reasons for Granting the Writ	8
Conclusion	10

Table of Authorities

Cases:

Alderman v. United States,
394 U.S. 165 (1969) 9

Brady v. Maryland,
373 U.S. 83 (1963) 2, 3, 5, 6, 7, 8, 9

Johnson v. Zerbst,
304 U.S. 458 (1938) 9

Napue v. Illinois,
363 U.S. 264 (1959) 8

United States v. Agurs,
427 U.S. 97 (1976) 2, 7, 8, 9

United States v. Geaney,
417 F.2d 1116 (2d Cir. 1969) 4

United States v. Provenzano,
440 F.Supp. 561 (S.D.N.Y. 1977) 2, 4

United States Constitution:

Fifth Amendment 2

Statutes:

28 U.S.C. § 1254(1) 2, 3

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The Petitioner Anthony Provenzano respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 16, 1980.

Opinion Below

The opinion of the Court of Appeals, not yet reported, appears in the appendix hereto. Two opinions of the District Court for the Southern District of New York relevant to the issue raised herein also appear in the appendix.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 16, 1980. A timely petition for rehearing and hearing *en banc* was denied on March 17, 1980 and this petition for certiorari was filed within thirty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented

1. Whether *United States v. Agurs*, 427 U.S. 97 (1976) and the due process clause permit a court to make a retrospective determination that the Government's suppression of evidence producible under *Brady v. Maryland*, was excusable because it would not have been used by the defense?

2. Whether the retrospective determination by both the District Court and the Court of Appeals that suppressed *Brady* material would not have been used by the defense has created an unconstitutional usurption of the defense function in criminal trials?

Constitutional Provision Involved

Amendment V. Due Process of Law

* * * nor be deprived of life, liberty, or property, without due process of law; * * *

Statement of the Case

This criminal case has had a complicated history. The complication was caused in part by dismissal of two earlier indictments which charged essentially the same offense. *United States v. Provenzano*, 440 F.Supp. 561 (S.D.N.Y. 1977). The post-conviction phase of this case was also made complicated by a multi-tiered *Brady* claim charging that the prosecution violated Petitioner's right to due process by suppression of

evidence which was constitutionally producible. It is the latter issue, the *Brady* claim, on which this petition is grounded.

Sandwiched in between the extensive pre- and post-trial litigation was the trial itself. This one count conspiracy indictment charged that Provenzano had agreed with others to pay a kickback to a union trustee in connection with a teamster pension fund mortgage loan to a New York hotel corporation. Title 18 United States Code Section 1954. Even though the courts below found evidence of Provenzano's guilt to be legally sufficient, this under any analysis was a very close case. The closeness of the case is noteworthy in evaluating the Circuit Court's disposition of Provenzano's *Brady* claim.

In large part the Government prosecuted here on the testimony of a single witness, Herman Goldfarb. Goldfarb, an undercover informant and agent provocator, testified to an elaborate scheme to obtain the mortgage loan for borrowers who would pay "points" or a percentage of the loan which would be distributed among the conspirators with a portion allegedly going to the trustee who played a role in approving the loan. Corroborated by recordings surreptitiously made by him, Goldfarb recounted a vast number of meetings at which the mortgage deal and the concomitant payment of "points" was planned and discussed.

But all of Goldfarb's testimony and all the Government's recordings could not, standing alone, have convicted Provenzano. The only non-hearsay independent proof of Provenzano's involvement was what he, Provenzano, allegedly said during the single occasion on which he met with the alleged conspirators. Because Goldfarb, who met Provenzano only this one time, was unable to identify Provenzano's voice on the tape, his testimony could not establish that Provenzano had

uttered a crucially important sentence which, if attributable to him, could have arguably shown knowledge and participation. As one district judge stated in dismissing an earlier indictment:

> In view of Goldfarb's statements in this one witness identification case, it is hard for the court to see how at trial a reasonable juror could find that the government had proved its case beyond a reasonable doubt. *United States v. Provenzano*, 440 F.Supp. 561, 566.

In order to fill the gap in its proof the Government called a witness named Ralph Picardo, who, after expressing familiarity with Provenzano's voice, identified him as the person whose own words supplied the necessary proof *aliunde*. *United States v. Geaney*, 417 F.2d 1116 (2d Cir. 1969). As such, Picardo became an absolutely indispensable feature of the Government's case against Provenzano. As would later be stated by the district court judge:

> First of all, I agree that Picardo was an important witness, he wasn't somebody who was unimportant; no doubt about that.
>
> I don't know the government's tactics, but perhaps what happened before Judge Bonsel where they only had the tape, you may not have had a trial, so I can only find that Picardo was an important witness...(A II 1088-89)*

---

* Before the Second Circuit Court of Appeals rendered its decision on January 16, 1980, the case was remanded for the limited purpose of allowing Petitioner to present additional newly discovered evidence to the district court. For this reason a supplemental record was transmitted to the Court of Appeals and a supplemental appendix was filed, denoted by "A II". The original appendix will be referred to as "A I". These appendices are on file in the United States Court of Appeals for the Second Circuit.

Thus it can be seen that Ralph Picardo's "credibility" or "reliability" was very much an issue in this case.

The *Brady* Violation.

When Picardo was called as a witness the Government made a mid-trial *Brady* disclosure. The Government attorney told the defense that Picardo had been placed in a witness relocation program and that the Government "would help assist him in obtaining a job." Secondly, the Government revealed that Picardo had been convicted of murder but that in May of 1977 the murder conviction was reversed by a New Jersey intermediate appellate court. (A I 1022-24) Although the defense did not know that Picardo would appear as a witness, in pre-trial motions a specific request was made for ". . .a statement of all inducements, promises, payments, or other considerations given or made to such persons by or at the request of the Government or of Government agents, prior to, during or after the instant investigation." Although this request was specifically directed "but not limited to" Herman Goldfarb, the request was broadened in the memorandum submitted in support of the motion.

> From the already available facts with respect to the nature and conduct of this investigation and of the individuals who executed the investigation, it is more than likely that the case will bristle with impeachment issues. It is respectfully submitted that this court should order the government to immediately gather all such impeachment evidence.

* * * *

> The defense wishes to leave no room for inadvertence in the present case. The government is placed on full notice that the defense requests and expects to receive every item which will be of value to the defense in its effort to impeach the prosecution witnesses or the integrity of other prosecution evidence. (Memo, A 181-182)

On the basis of what the government did turn over the defense chose not to cross-examine Picardo. This did not mean however that Picardo's credibility was not an issue at trial. Defense counsel, on summation, argued:

> I'm going to show you a little later why I didn't ask Mr. Picardo a single question. It was because Mr. Picardo who demonstrated his own answer, one answer that he gave on direct examination that he is going to prove that he, the pinch hitter brought in by Mr. Frankel, the government, the pinch hitter, to prove that it was my client's voice that said something, and I will show you where he lied, lied through his teeth about something, trying to put the extra zinger into Mr. Provenzano. (A I 1192)

After the guilty verdict was returned, but before sentence, Provenzano filed a motion for a new trial F.R.C.P. Rule 33 claiming that the Government had withheld *Brady* material and thus committed a due process violation. By the time this motion was argued it was the defense claim that the Government had withheld five separate yet highly significant pieces of information. These were: (1) The Government obtained Picardo's release from state prison; (2) the Government aided Picardo in obtaining bail pending appeal of the murder conviction; (3) the Government wrote a letter to the State Appellate Clerk to aid Picardo concerning his right to appeal that conviction; (4) the Government

prevented New Jersey from retrying Picardo when his murder conviction was reversed upon appeal; (5) the Government obtained the dismissal of state criminal larceny charges pending against Picardo.

In its first Opinion (Appendix p. 1A) the District Court denied the motion because in the case of the first three items counsel would not have used it and in the case of the latter two, because the charges were too speculative. It was later developed however that these *Brady* claims represented only the tip of a rather formidable iceberg. Although the Government vehemently denied making any promises to Picardo relative to his New Jersey murder case (which had not simply been reversed but rather reversed and remanded for a new trial) it was found that Picardo was told by "authorities" that a re-trial was "unlikely". (A II 752) But this was not all. It was also discovered that the Government withheld: (1) Government promises to Picardo of executive clemency if he were convicted again on the reversed murder charge; (2) Promises of immunity to Picardo in return for his cooperation with New Jersey authorities; (3) The fact that Picardo escaped from a Maine prison facility and was not prosecuted; (4) Picardo's history of prior criminal conduct; (5) Conflicting statements made by Picardo to Government officials concerning Provenzano activities; (6) Discussions by Picardo about illegal methods of overturning his own murder conviction; and (7) Attempts by Picardo to tamper with a jury in his own criminal case.

The Circuit Court of Appeals, in affirming the conviction, "assumed arguendo" that all of the material sought was the subject of specific requests and properly producible by the Government. *United States v. Agurs*, 427 U.S. 97 (1976). Nevertheless, the Circuit Court affirmed the District Court's orders twice denying Petitioner's new trial motion.

Reasons for Granting the Writ

Although recognizing that "courts should not lightly infer that undisclosed *Brady* material would not have been used by the defense", the Circuit Court has apparently struck new ground in excusing the Government's failure to disclose evidence "favorable to the accused" within the meaning of *Brady v. Maryland*, 373 U.S. 83 (1963) and *Napue v. Illinois*, 363 U.S. 264 (1959).

The record in this case clearly establishes a violation of the constitutional principal announced in *Brady*. With the *Brady* violation established, the issue to be determined is whether the Government's withholding of the evidence in question requires a new trial. In other words what was the effect of this non-disclosure under the guidelines set forth in *United States v. Agurs*, 427 U.S. 97 (1976). Since the Circuit Court assumed arguendo "that all of the material sought by the defense was the subject of specific requests for production and was properly producible by the Government", the question is whether there was a reasonable likelihood that the undisclosed evidence would have affected the outcome of the trial. The Circuit Court concluded that it would not have. Slip Op. p. 974. And the conclusion that it would not have turns on the rather unorthodox finding that the evidence would not have affected the outcome of the trial simply because it would not have been used.

> We reached this conclusion because we are satisfied that the defense never would have used this undisclosed evidence to impeach Picardo. Slip Op. p. 974.

Petitioner argues that if he were constitutionally entitled to this material, a fact which the Circuit Court acknowledges, then *he* was constitutionally entitled to have the opportunity to decide whether or not this

material would be used. As argued on appeal this right was as constitutionally important as the right to the material itself. The net effect of the rulings by both the District Court and this Court was that defense counsel waived cross-examination and no amount of additional impeachment evidence would have caused counsel to regret that waiver. But waiver of a constitutional right, *i.e.*, cross-examination and thus confrontation, must be knowing and intelligent. Fundamental constitutional rights are presumed not waived unless knowingly and intentionally relinquished. *Johnson v. Zerbst*, 304 U.S. 458 (1938). It has long been understood that it is for the defense to assess whether any value lies in evidence available to it. *Alderman v. United States*, 394 U.S. 165 (1969).

In this case Petitioner has repeatedly urged that if the withheld material had been produced, cross-examination of Picardo would have followed. But even more important than this assertion is the argument that counsel was constitutionally entitled to make that decision. An *Agurs* analysis of the withheld evidence impliedly required an assumption that the evidence would have been used. With this assumption the only question is the impact the evidence would have had on the trial. For a reviewing court to attempt to unravel the trial in order to express retrospective opinions about defense counsel's tactics would work an unfair usurption of the defense function. For this reason an *Agurs* analysis of a clear and apparent *Brady* violation requires, indeed, always requires, the assumption that the evidence would have been used.

Conclusion

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

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April 16, 1980

APPENDICES

Appendix A

Opinion of United States District Court
Dated June 22, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
77 Cr. 889

UNITED STATES OF AMERICA,

-against-

ANTHONY PROVENZANO, a/k/a "Tony Pro,"
and ANTHONY BENTRO,

Defendants.

METZNER, D.J.:

Defendants move pursuant to Fed. R. Crim. P. 33 for a new trial on the ground that the prosecutor withheld evidence to which the defendants were entitled under *Brady v. Maryland*, 373 U.S. 83 (1963), and 18 U.S.C. § 3500. They also seek discovery in connection with the motion. The government moves to quash a subpoena already served upon them by defendant Provenzano.

Defendants were found guilty by a jury of conspiracy to pay a kickback to a labor union official in violation of 18 U.S.C. § 371. A major government witness was Ralph Picardo, a longtime former associate of defendant Provenzano. Picardo identified both defendants' voices on a tape recording of a meeting of the co-conspirators held on July 11, 1974.

Just before Picardo testified, the government turned over *Brady* and 3500 material to defense counsel, and the trial was adjourned for three-quarters of an hour to give counsel adequate time to look over the material before Picardo took the stand.

Appendix A

Opinion of United States District Court
Dated June 22, 1978

The 3500 material consisted of Picardo's grand jury testimony relating to the instant indictment. The *Brady* material included Picardo's criminal record, which contained an entry indicating that he entered New Jersey state prison on May 2, 1975, to begin serving a 15-20 year sentence for a murder conviction. Also provided to counsel was a listing of disbursements made to Picardo under the federal witness protection program during the period of December 1975 to March 1978. The prosecutor informed counsel that "[Picardo] was taken into the Government relocation program sometime in 1975, at which time it was agreed that he would be paid subsistence . . . and that he would be relocated . . . ." Tr. at 534. Thus, defendants were informed that Picardo was in the witness protection program at a period subsequent to his entering state prison.

Neither defendant chose to cross-examine Picardo.

On this motion, defendants claim that the government failed to meet its 3500 obligation by not turning over testimony Picardo gave before an earlier grand jury which was investigating an unrelated charge against Provenzano. The court has carefully examined the minutes of that grand jury testimony *in camera*. There is absolutely nothing therein regarding Picardo's relationship with Provenzano which is not also contained in the grand jury minutes from this indictment. Therefore, defendants were in no way prejudiced by not receiving the minutes of the earlier grand jury.

Regarding *Brady* material, defendants make the following five claims of undisclosed benefits that were allegedly provided to Picardo in return for his testifying:

Appendix A

Opinion of United States District Court
Dated June 22, 1978

1. The government obtained Picardo's release from state prison.

2. The government aided Picardo in obtaining bail pending appeal of the murder conviction.

3. The government wrote a letter to the state appellate clerk to aid Picardo in preserving his right to appeal that conviction.

4. The government prevented New Jersey from retrying Picardo when his murder conviction was reversed upon appeal.

5. The government obtained the dismissal of state criminal larceny charges pending against Picardo.

Addressing claims 1 through 3, I will assume for the purpose of this motion that the defendants made specific *Brady* requests during pretrial discovery. Where a specific *Brady* request is made, a new trial must be granted if the undisclosed evidence could have affected the trial's outcome. *United States v. Agurs*, 427 U.S. 97 (1976).

Under the *Agurs* test, defendants are not entitled to a new trial. It is abundantly clear from the record that evidence of intervention by the government regarding the state murder prosecution would not have prompted cross-examination by defendants. As Provenzano's counsel stated in his memorandum of law accompanying this motion:

> "As any skilled trial lawyer knows, cross-examination on [Picardo's entry into the witness protection program] was fraught with danger. Whether his fear was warranted or not, the witness would then undoubtedly testify that he was placed in such a program because of fear of retaliation."

Appendix A

Opinion of United States District Court
Dated June 22, 1978

The government's answering affidavits establish that all the actions cited by defendants as evidence of the benefits alleged in 1 through 3, *supra*, were taken in the course of the government's supervision of Picardo under the witness protection program. Thus, for example, defendants appended as an exhibit to their motion an affidavit by an inspector of the United States Marshal's Service submitted to the New Jersey court, which informed the court that Picardo was in the witness program and requested that any bail arrangements include a provision that Picardo comply with the requirements of the program.

If the defendants had cross-examined Picardo regarding these actions, I would have permitted the government to elicit testimony on redirect to show the complete agreement and Picardo's entry into the witness program and the reasons therefor.

Although Bentro's counsel belatedly makes the argument that Picardo would have no reason to fear Bentro and therefore Bentro could have cross-examined in this area with impunity, it was manifest to the court that Bentro's counsel made a trial tactic decision that this was an area to be avoided. As noted above, he took no advantage of the impeachment opportunity provided by the *Brady* material he received.

With regard to defendants' fourth claim that the government has refused to make Picardo available to New Jersey authorities for retrial on the murder charges, they have failed to provide any basis for this contention beyond purely speculative conjecture in a newspaper article. Defendants are therefore not entitled to a hearing on this claim.

Appendix A

Opinion of United States District Court
Dated June 22, 1978

Finally, with regard to the fifth claim, the New Jersey Assistant Prosecutor's motion to dismiss the larceny charges, which is attached to the affidavit of Richard Gregorie on this motion, establishes beyond doubt that the state had ample grounds for dismissing those charges and that it did not do so in satisfaction of any request by the federal authorities.

Accordingly, the defendants' motion for a new trial is denied, as is their request for discovery, which would constitute an unwarranted fishing expedition. The government's motion to quash the subpoena is granted.

So ordered.

Dated:
New York, N.Y.
June 22, 1978

/s/ Charles M. Metzner
U.S.D.J.

Opinion of United States District Court
Dated June 27, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
77 Civ. 889
(CMM)

UNITED STATES OF AMERICA,

-against-

ANTHONY PROVENZANO and
ANTHONY BENTRO,

Defendants.

METZNER, D.J.:

Defendants Provenzano and Bentro move for an order pursuant to Fed. R. Crim. P. 33 granting defendants a new trial upon the ground that the government suppressed evidence favorable to them in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This is the second motion seeking this relief.

The defendants were found guilty by a jury on March 25, 1978, after a seven-day trial. Their first motion for a new trial based on a claim of suppression of evidence in violation of *Brady* was finally submitted to the court by the defendants on May 31, 1978. This motion was denied in an opinion dated June 22, 1978. I see no reason to disturb the original findings based on the record before the court at that time.

The present motion refers to FBI reports and other documents, including the transcript of Picardo's testimony in a New Jersey trial a few months ago, which were obtained after the disposition of the first motion. The question is whether the availability of this material calls for a result different from the first determination.

Appendix B

Opinion of United States District Court
Dated June 27, 1979

In *Brady* the Court said (373 U.S. at 87):

> "We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."

The court does not question the good faith of the prosecutor in his efforts to obtain all material relating to Picardo.

The meaning of the word "material" as used in *Brady* was explained by the Court in *United States v. Agurs*, 427 U.S. 97 (1976), when it said at 104:

> "A fair analysis of the holding in *Brady* indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."

The Court went on to describe how a trial court should determine materiality. When a showing of nondisclosure is brought to the attention of the court after trial, it must be weighed to determine whether the defendant has been deprived of his right to due process. The mere fact that the reports might have affected the outcome of the trial does not establish materiality in the constitutional sense. However, the defendant need not satisfy the court that the newly discovered evidence properly would have resulted in an acquittal if it had been available at the trial. Finally, the Court said at 112-13:

> The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond

a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." (Footnotes omitted.)

We now turn to review the mass of papers submitted on the motion, after first having heard oral argument by counsel.

Picardo's conviction for murder in New Jersey had been reversed and remanded nearly a year before the beginning of the trial in this court in March 1978. Even though the reversal is found in an unreported opinion of the court, it is inconceivable to this court that Provenzano who lived in New Jersey, and whose base of operations was in New Jersey at the head of a powerful Teamster local, did not know of this fact. It also appears from some of the material submitted in support of the motion that Provenzano and Picardo had more than a nodding acquaintance which I will discuss later on.

Next we have the flat assertion by defendants that the United States Government made a promise to Picardo that he would not be retried on the murder charge. Counsel relies on item 4 of the "Statement of Understanding Re-Ralph Picardo" for this accusation. That statement says:

"Picardo, who has also agreed to cooperate with the New Jersey state authorities has been told by the authorities that a new trial is unlikely."

The reference to "authorities" is clearly to the state authorities and not to the federal authorities. Furthermore, there was no promise that there would not be a new trial, merely a statement that such a trial would be unlikely. It appears that the state legal authorities believed that the conviction would be reversed on appeal, and for the same reasons believed that a new trial would result in an acquittal.

On March 28, 1979, Jeffrey Speiser, an attorney with the Department of Justice, Organized Crime and Racketeering Section, attached to the Newark Strike Force, sent a letter to the attorneys for Provenzano, who was a defendant in a pending criminal indictment in the District Court of New Jersey. This was a year after the trial in this court, and at a time when Speiser had just joined the Newark operation. The letter states that Picardo had been promised that when he completed testifying in all cases in which he was potentially a government witness, "the government would make known to any parole board the extent of Mr. Picardo's cooperation and would recommend that he would receive a parole, or if Mr. Picardo chose to file a petition for clemency, the government would join in that petition."

The experienced counsel who represented the defendants on this trial know the usual boiler plate words used to express the promises made to criminals and accomplices who testify against defendants on trial. It is general in tone and not as specific as that used by Speiser, but states that the witness' cooperation will be made known to the proper authorities. Counsel

could have pressed for details if they so desired during the discussion which took place before Picardo testified (Tr. 534-553), but they did not do so.

The Assistant United States Attorney has stated under oath, and I see no reason to disbelieve him, that in the number of conferences he had with Picardo before he testified in this case, he specifically asked Picardo on at least five occasions to detail the promises made to him by the government. Among other things Picardo replied in general terms that the government had promised to make his cooperation known to all authorities to whom Picardo asked the information be given. Specifically, Picardo said that no promises were made to him regarding a possible retrial of the murder indictment, simply because no one would lift a finger to help him in this regard. The agents and attorneys who were working with Picardo on other matters all confirmed that no promise of any help regarding an application for parole had ever been made to Picardo. This specific reference first appears as the result of Picardo making the statement in connection with the preparation for the trial in New Jersey which occurred a year after the trial in this court.

Counsel have urged that the court must view two areas of concern to them - favors given to Picardo, and Picardo's motive for testifying against them. It appears to the court that the two are intertwined since the favor supplies the motive. Here the real claim is that favors were offered Picardo by the government in the murder case, but the government "obscured the true facts by leading defense counsel to believe that there was absolutely no relation between the murder case and the witness' cooperation (T. 534-36)."

There is nothing in the cited pages of the transcript that supports this charge. It clearly was not the purpose of the government's statements at that time. The government was trying to blunt the attack on the witness' credibility by requesting that no reference be made to the fact of conviction.

Interestingly enough, at p. 536, when defense counsel is first afforded an opportunity to answer the government's request, the following appears:

"THE COURT: Mr. Edelbaum?

MR. EDELBAUM: Your Honor, may I first inquire, before anything else, is it the purpose of this witness' testimony to show propensity?

MR. FRANKEL: Yes, your Honor, that is one of the areas, and the second area is also, of course, identification.

MR. EDELBAUM: Your Honor, on the question of propensity, I at this time withdraw my request for an entrapment charge to this jury and I, therefore, suggest to your Honor, that any evidence of propensity be excluded from this jury.

THE COURT: Mr. Tigue, you also requested a charge of propensity?

MR. TIGUE: I would withdraw it as well if the Government is precluded from offering that evidence.

MR. EDELBAUM: And I won't argue entrapment."

Appendix B

Opinion of United States District Court
Dated June 27, 1979

Clearly, defendants wanted no part of that murder conviction for their own good reasons which were completely unrelated to favors or motive for testifying falsely. The tactical decision was based on such strong reasoning that defendants were willing to forgo attacking credibility, if in fact material of which they had no knowledge existed to support such attack.

Nothing speaks more eloquently of counsel's thinking than the record itself, from which the following quotations are particularly striking:

> "MR. EDELBAUM: * * * . . . I say to your Honor, all this business of bringing in -- I think it is highly prejudicial now -- to bring in a guy with a record, who had been reversed, for murder, convicted, and to show his association with Mr. Provenzano, the prejudice that will go to this jury on voice identification." (Tr. 545)

MR. EDELBAUM: * * * Judge, you have been around long enough, almost as long as I have been around. You know why they are bringing this character in. You know that they are not bringing this delightful character in just for a voice identification.

They want this jury to learn that this man with a record, this man who has been convicted of crime, they want the jury to know that he was associated with Mr. Provenzano. Isn't that terrible?

THE COURT; They have made a request that you make no reference to this man's record. They don't want a reference made to this man's record.

Appendix B

Opinion of United States District Court
Dated June 27, 1979

MR. EDELBAUM: You know the vise [sic] of that, Judge, is it restricts me. It restricts me from going on cross examining him to show his bias, his reason for testifying, what he has to gain.

THE COURT: *Then do it.*

MR. EDELBAUM: Judge, if I do that I cut off my legs. I bring in something which is *so prejudicial.* Why do they bring this man in?" (Tr. 547-48) (Emphasis supplied.)

> "MR. TIGUE: * * * . . . it would seem to me that the prejudice here so far outweighs the probative value that the government ought to be required to use the less prejudicial route in proving who said what on page 4 or 5 of the transcript.
>
> It seems to me that the balance is just weighed against the defendants here by bringing this person in, and establishing *essentially guilt by association.*" (Tr. 549-50) (Emphasis supplied.)
>
> "MR. TIGUE: One last thing, please, I would suggest to minimize the prejudice in this area that Mr. Frankel be permitted to ask leading questions regarding the connection or the knowledge he has - -
>
> THE COURT: You will be more than happy to ask leading questions, won't you?
>
> MR. FRANKEL: That is correct, your Honor." (Tr. 553)

According to the transcript at this point, defense counsel were afforded an hour to discuss with their clients how Picardo should be handled. The decision was clear--they conducted no cross examination of Picardo. Thus, Picardo was prevented from furnishing

any further damaging evidence against them either on cross or redirect examination.

There are a number of other items pointed to by the defendants which, despite their characterization as being "a powerful basis for cross examination of Picardo," evaporate on close examination.

For example, the government did not participate in an effort to block Picardo's prosecution for escaping from custody. The agents submitted the factual material to the United States Attorney who, after reviewing it, declined prosecution because not warranted by the facts. The decision is easily understood when you know the agents' views on the escape which are set forth in affidavits submitted on this motion. It is also one of the explanations why reference to the escape was not made at the bail application concerning which the government's attitude shocks the conscience of defense counsel. There just was no help given to Picardo in that application aside from furnishing the court with factual material regarding his status in the witness protection program. The court certainly needed that information to make an informed decision.

There is no basis to an allegation that Partington executed his affidavit on December 23, 1977, with the full knowledge that Picardo had escaped from jail in Maine on that very day.

The notes by the Assistant United States Attorney Stewart did not refer to the 1974 meeting which was the basis of the indictment in this case. It clearly refers to a meeting a year before that in 1973. This is a classic case of similar act which certainly justifies the tactical decision made by defendants on the trial. If there were to be a new trial in this case, defense counsel would

fight to keep it out on direct examination, and wouldn't touch it with a ten-foot pole on cross examination.

Defendants claim that Picardo gave the agents wrong information. The exhibits which they submit in support of this accusation merely show that Picardo said certain people were present at a meeting in the Americana Hotel in Miami, Florida, but the agents could not corroborate the statement by looking at the hotel register. Failure to be able to corroborate the statement does not mean that the statement is false. Furthermore, I am not prepared to assume that the persons in the circles in which these defendants move always give their right names.

Counsel make much of the information in these reports about Picardo's criminal activities other than the murder conviction, and urge that it furnishes powerful material for destroying his credibility. There is no doubt that Picardo is not a nice boy. Again, I am sure that this was not unknown to the defendants. In view of defendants' studied tactical decision not to make Picardo's criminal record known to the jury, it is inconceivable that a few more specifics, even assuming Provenzano's lack of knowledge of such specifics, might have changed the course of the trial.

Furthermore, one of the exhibits which sets forth some of Picardo's criminal activities as he related them to the agents, includes references to Provenzano and his group. Under the circumstances, would counsel have changed their tactics and opened the door to the defendants' prior activities and the field day it would have afforded the government on redirect examination?

For example, in this very same document, Picardo speaks of meeting with Provenzano and a man named

Fred Turino. Later in the document it is stated that the merchandise taken in the hijacking was given to Turino to dispose of.

Defendants are shocked that Picardo, in connection with being handled under the witness protection program, was put in an institution which permitted visits from his family. I never understood this to be a special favor, unless Picardo for some reason of misbehavior was being punished by being denied such visits. Nothing to this effect appears in the record.

Defendants are also shocked at the promise that Picardo extracted that he would not be put in solitary confinement, again in connection with the witness protection program. Counsel know very well that this could be part of the protective device programmed for a cooperating prisoner, but Picardo did not want that alternative. There was no basis for putting him in solitary confinement absent cooperation, and therefore Picardo was not getting more favorable treatment for his cooperation.

Counsel refer to the promise by the government to make sure that Picardo would receive all the credit he was entitled to in computing his parole eligibility time. I fail to see the materiality of such evidence to attack Picardo's credibility.

Finally, there is counsel's shock at learning for the first time after trial that Picardo was put in the witness protection program because of the rumors received from several sources that Provenzano had issued a "contract" to kill him. I must admit that I have great difficulty in understanding how counsel would bring this tidbit to the attention of the jury to help convince

it that the defendants were innocent. Are we to believe that such information would help destroy Picardo's credibility?

If by some chance defendants devised a way to bring this information to the attention of the jury without harming their position, I speculate about the possibility that the murder of Briguglio might not become material on redirect examination. Briguglio's name was mentioned in some of the reports which counsel have submitted to the court. Briguglio was reputedly a close associate of Provenzano and was murdered on the second day of this trial over on Mott Street, just a few blocks away from the courthouse. Fortunately, the jury was sequestered and did not learn of the murder during the course of the trial.

Then there was the pending murder indictment against Provenzano and Briguglio in the New York state court which went to trial immediately after this trial, and in which Picardo was again a principal witness for the prosecution. Killings, threats of killings, and alleged involvement in killings do not seem to be uncommon in these circles, and rumors of "contracts" must be taken seriously.

In weighing this material and its possible impact on the outcome of the trial, the court is justified in taking into consideration counsel's studied decision not to cross examine Picardo, and the reasons therefor. It seems to me that all of Picardo's prior bad behavior would only buttress defendants' position to stay as far away from him as possible.

Of course, each defendant must be treated separately in this application, but anyone familiar with the transcript

Appendix B

Opinion of United States District Court
Dated June 27, 1979

of the trial knows that the case against Bentro was much stronger than the one against Provenzano.

Counsel vehemently claim, however, that the material discussed above would be used if a new trial were to be granted. I do not find any need for an evidentiary hearing on any of the claims made by defendants. Only last month in the New Jersey trial Picardo went through a searching cross examination by Provenzano's counsel who, at the time, had all of this material in his possession.

It is clear to me from the analysis I have made of the material, and taking into consideration the scope of redirect examination available to the government, that in the context of the standard of materiality quoted above from *Agurs*, this motion must be denied.

So ordered.

Dated: Charles M. Metzner
New York, N.Y. U.S.D.J.
June 26, 1979

Appendix C

Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 221, 361—September Term, 1979
(Argued finally September 17, 1979
Decided January 16, 1980.)
Docket Nos. 78-1251, 79-1247

UNITED STATES OF AMERICA,
Appellee,

-v.-

ANTHONY PROVENZANO, a/k/a "TONY PRO",
Appellant.

Before:

FRIENDLY, TIMBERS and VAN GRAAFEILAND,
Circuit Judges.

Appeal from a judgment entered after a jury trial in the Southern District of New York, Charles M. Metzner, *District Judge*, convicting appellant of conspiracy to pay a kickback to a union pension and welfare fund trustee to obtain favorable action on a loan proposal.

Affirmed.

Appendix C

Opinion of United States Court of Appeals

Gerald L. Shargel, New York, N.Y. (Maurice Edelbaum, Jay Goldberg, John Pollok, and Fischetti & Shargel, and Hoffman, Pollok, Mass & Gasthalter, New York, N.Y., on the brief), *for appellant.*

Barbara S. Jones, Asst. U.S. Atty., and Steven K. Frankel, Asst. U.S. Atty., New York, N.Y. (Robert B. Fiske, Jr., U.S. Atty, and Howard W. Goldstein, Asst. U.S. Atty., New York, N.Y., on the brief), *for appellee.*

TIMBERS, *Circuit Judge*:

On this appeal from a judgment entered after a seven day jury trial in the Southern District of New York, Charles M. Metzner, *District Judge*, convicting appellant of conspiracy to pay a kickback to a union pension and welfare fund trustee to obtain favorable action on a loan proposal, in violation of 18 U.S.C. §§ 371 and 1954 (1976), we find the following to be the principal questions raised on appeal:

(1) Whether the evidence was sufficient to support the conviction;

(2) Whether the district court erred in its charge to the jury; and

(3) Whether the district court erred in denying appellant's motions for a new trial based on asserted non-compliance by the government with the disclosure requirements of *Brady v. Maryland*, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. § 3500 (1976).

For the reasons below, we affirm.

Appendix C

Opinion of United States Court of Appeals

I.

The essence of the crime of which appellant was convicted was that he and co-defendant Anthony Bentro[1] conspired to pay a kickback to Rocco DePerno ("Rock"), a union pension and welfare fund trustee, to obtain DePerno's favorable action on a proposed mortgage loan to the Woodstock Hotel in Manhattan. DePerno's kickback, as well as substantial sums[2] for Bentro, Provenzano and other conspirators, were to come from so-called "bonus points", i.e. large, under-the-table amounts to be paid by the borrower in addition to legal interest.

In view of appellant's challenge to the sufficiency of the evidence, we summarize here in some detail those facts believed to be necessary to an understanding of our rulings on the legal issues raised.

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[1]Bentro was tried and convicted with Provenzano on the same conspiracy count. On the original appeal, which was argued before us on October 16, 1978, Bentro was an appellant as well as Provenzano. Subsequently, however, Bentro entered into a cooperation agreement with the government. Prior to the second argument before us on September 17, 1979, we granted the government's motion to remand Bentro's case to the district court so that the government, pursuant to this cooperation agreement, could consent to the entry of an order vacating Bentro's conviction. Provenzano remains the sole appellant here.

[2]The amounts of illegal payments contemplated, if the deal had been consummated as planned, are substantial. The thirteen "bonus points" referred to below amount to $325,000 on the initially planned $2.5 million mortgage, or $25,000 a "point". Keeping in mind the ratio of bonus points to the amount of the deal helps to explain the seriousness of the warning, referred to below, that Rock will "take ten" on a $2.5 million deal, or a quarter of a million dollars. It also explains why Paladino and Goldfarb were pleased to learn that their share had been increased by three points.

Appendix C

Opinion of United States Court of Appeals

A.

The instant indictment resulted from "Operation Cleveland", a special joint federalcity undercover project which was established to investigate corruption and organized crime in the garment center of New York City. Toward that end, the Gerro Trucking Company was set up as a front for the investigation. An FBI informant, Herman Goldfarb, was installed as the trucking company's president. Before long, Goldfarb was approached by one Lawrence Paladino, who later was named as an unindicted conspirator. He offered the Gerro company labor tranquility in exchange for extortion payments of $150 a month.

Those in charge of the investigation decided to pay the sum demanded. They hoped to use Paladino as an entree to other criminal groups preying on the clothing industry. They were not disappointed. Paladino and Goldfarb soon began to discuss arranging loans for various parties from labor union funds. Paladino and Goldfarb were to retain substantial sub rosa "commissions" for their efforts. Paladino told his new business associates that Provenzano — "Tony Pro" — would be able to obtain the mortgage money required for their loans.

During a March 6, 1974 conversation, for example, Paladino told Goldfarb that he had informed Provenzano of a possible $2.5 million loan deal. Paladino said he would arrange a meeting for Goldfarb to talk the matter over with Sam Provenzano, a New Jersey union leader and appellant's brother.[3] Paladino and

[3]Unless otherwise stated, all references in this opinion to "Provenzano" are to appellant Anthony Provenzano, as distinguished from his brother Sam Provenzano.

Appendix C

Opinion of United States Court of Appeals

Goldfarb had discussed charging 12 per cent interest for the loan itself, plus "13 points" of "bonus money", or $325,000, for themselves. Paladino stated, however, that "over there I don't know what the percentage is." He urged Goldfarb to be candid with "Sammy", suggesting that "we split down the middle."[4]

The Woodstock Hotel mortgage loan transaction was first discussed in June 1974. At that time Goldfarb learned through Hyman Schwartz, a mutual friend, that one of the hotel's new owners, Gilbert Federbusch, was seeking a mortgage loan for refurbishing and to retire old debts. The three men met at the Gerro office shortly thereafter. Federbusch agreed to the terms outlined by Goldfarb: a $2.5 million mortgage loan would be obtained from a union, with interest of one per cent a month plus a 13 per cent "bonus."

At a meeting on July 2 Paladino told Goldfarb that arrangements for the mortgage had been completed. He stated, however, that the 13 per cent bonus would have to be split with others. He informed Goldfarb that he planned to funnel the loan "through Utica", the home of DePerno's local. He warned Goldfarb not to "even mention Tony Pro." On July 11 a meeting took place in a midtown office. Goldfarb, Provenzano, Bentro, Paladino and others were present. They discussed several transactions, including the Woodstock mortgage. Viewing this discussion in the light most

[4]Tapes of conversations referred to in this opinion were obtained by the government through Goldfarb, who wore either a Kell electronic transmitter, a Nagra recording device, or both. Most of his meetings also were under surveillance by New York City police officers.

The tapes of these conversations have various unintelligible segments. This goes to their weight, not their admissibility. *United States v. Bryant*, 480 F.2d 785, 789-91 (2 Cir. 1973). No issue is raised on appeal regarding the admissibility of the tapes or the transcripts thereof.

favorable to the government, as we must at this stage of the case,[5] the jury could have found that the following is substantially what took place.[6]

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[5]*United States v. McCarthy*, 473 F.2d 300, 302 (2 Cir. 1972); *Glasser v. United States*, 315 U.S. 60, 80 (1942).

[6]The most critical part of the discussion at the July 11 meeting, according to the transcript of the tape recording produced by the government, is the following:

"Tony Bentro: Is this the one at 2.4 Larry?

[Unknown Person]: [Unintelligible]

[Goldfarb]: Two million three. She'll appraise out at 3.5.

Tony Bentro: All right, Tony, on this, Rock said, I gotta give it to Harold Silverberg. That's where I'm gonna go tomorrow [unintelligible].

Tony Provenzano: You're not interested?

Tony Bentro: Oh, Rock, I can't.

Tony Provenzano: He's gonna take ten.

Tony Bentro: Rock'll take half. [Unintelligible] Harold puts the okay. Harold puts the okay if it's good. Not good. If it's on the line he'll take it an' say okay. He's a New York accountant or [unintelligible] former New York accountant.

Tony Bentro: He'll take half...[unintelligible].

Tony Provenzano: [Unintelligible]

Tony Bentro: So Rock'll take what?

Tony Provenzano: 2.3 altogether?

[Goldfarb]: We want two million three.

[Unknown Person]: 2.3.

[Goldfarb] 2.3...

Tony Bentro: Rock'll take [unintelligible].

Tony Provenzano: The whole thing.

Tony Bentro: Yeah.

[Goldfarb]: It appraises for 3.5, Tony.

Tony Bentro: So Larry, you'll take a quarter.

[Goldfarb]: So we're taking 70 percent.

Tony Bentro: Right."

There was a brief initial discussion of the Woodstock deal. Provenzano interjected questions about the hotel's name and location. Goldfarb outlined the supporting documentation for the deal. He explained the tax advantage the hotel owner was obtaining. Then Bentro, addressing Provenzano, said that "Rock" had told him, "I gotta give it to Harold Silverberg" for approval. Silverberg was the accountant for DePerno's pension fund. Provenzano asked Bentro whether the reference to an accounting approval indicated a lack of interest on the part of Bentro. The latter replied, "Oh, Rock, I can't." Provenzano warned, "He's gonna take ten", referring to Rock. Bentro then stated that he anticipated that the accountant's scrutiny of the transaction would be purely pro forma. According to Bentro, "Harold puts the okay. Harold puts the okay if it's good. Not good. If it's on the line he'll take it an' say okay."

Provenzano then established through questioning of Bentro and others that DePerno would finance "the whole thing." After a brief discussion of restaurant concessions in Utica, the men turned to the matter of what additional documentation would be needed to close the Woodstock deal. Goldfarb wanted some guarantee of the loan before spending "a few thousand bucks" for a realtor's appraisal of the property. Bentro explained that before he could provide a letter of intent he had to "get some approval, half ass approval from the board", adding, "With Rock DiPerna [sic] from the board."

Bentro told Goldfarb to see the accountant Silverberg the following day. He assured him that Rock was fully familiar with the details of the deal—legitimate and otherwise:

> "See, I told Rock the whole bit . . . . I gave it to Rock, and I told him, look at the numbers . . . [unintelligible], thirteen per cent plus monthly . . . [unintelligible] . . . whatever they want." (emphasis added).

Paladino was alarmed. He feared that Bentro had agreed that DePerno would get the entire "bonus". Paladino said to Bentro, "Thirteen, you told him he was gonna get thirteen?" Bentro replied that the legal interest rate on the loan would be 12 per cent. There was further discussion, initiated by Paladino, regarding "the percentage over here and we're gonna make under", referring to the bonus points.

Bentro then commented on the large amount of money at DePerno's disposal in the pension and welfare fund, and the relatively few governmental restrictions on its use. There was further discussion of the bonus money and its division. Bentro assured Paladino and Goldfarb that, although "the ten" that DePerno would likely seek was "the going rate",[7] Tony (Provenzano) would talk to the trustee because "Tony can do [unintelligible] . . . with Rock." As Bentro had stated earlier on this matter:

> "So you, you tell Tony what you're gettin' an' Tony'll tell you what you gonna give away, whatever he can cut off comes back."

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[7]Goldfarb testified at the trial that "the going rate" of ten might have referred to the legal interest rate rather than the illegal rake-off. Before the grand jury, however, he had testified that it referred to the bonus points. His grand jury testimony was introduced at the trial.

Shortly after the July 11 meeting Paladino brought good news to Goldfarb. The latter testified at trial that Paladino told him that their share of the bonus had been upped from five to eight "points", with the remaining five going to the union, i.e. to DePerno. At a meeting on July 17 Paladino again confirmed that "his side" would be getting eight points. He also explained, "[T]here's three on their side . . . Tony, Tony and another guy [unintelligible]", to which Goldfarb replied, "Must be DePerna [sic]." Paladino responded, "I don't even want to know. *That's who I'm speaking of.* Don't go into that." (emphasis added).

B.

The mortgage loan transaction for the Woodstock Hotel never was consummated. By October 1974 the government had closed down Operation Cleveland and had sold the Gerro Trucking Company.

On December 9, 1975 a Southern District grand jury returned indictment 75 Cr. 1194 which charged Provenzano and Bentro with a conspiracy to offer DePerno, a union official, a kickback to influence actions in his official capacity. A superseding indictment, also 75 Cr. 1194, was returned on September 21, 1977 naming the same two defendants.

The history of the indictments in 75 Cr. 1194 is set forth in Judge Bonsal's opinion of November 11, 1977. *United States v. Provenzano*, 440 F.Supp. 561 (S.D.N.Y. 1977). The upshot was that Judge Bonsal, upon motions by both defendants, ordered the original and superseding indictments in 75 Cr. 1194 dismissed without prejudice to the government's seeking a new indictment. Between the time of informant Goldfarb's cooperation and his testimony before the second grand

jury, he had had a change of heart about the case. In a letter dated October 7, 1977 to Barbara Jones, the Assistant United States Attorney in charge of the case, Goldfarb recited his dissatisfaction with the treatment accorded him by the government and hedged significantly on his testimony against Provenzano. He informed Miss Jones that he had not been looking at Provenzano when the "He's gonna take ten" remark was made at the July 11, 1974 meeting and he had assumed by the process of elimination that it was Provenzano talking. Judge Bonsal dismissed the superseding indictment because the government had failed to bring Goldfarb before the second grand jury but had relied instead on his earlier, less equivocal grand jury testimony.

On December 19, 1977, approximately a month after Judge Bonsal's decision, another indictment, 77 Cr. 889, charging substantially the same kickback conspiracy was returned. This third indictment led to the instant convictions of Provenzano and Bentro.

The trial began before Judge Metzner on March 17, 1978. The government's case again relied on the testimony of informant Goldfarb. Goldfarb by this time professed an inability to identify Provenzano's voice on the tape of the crucial July 11, 1974 meeting. This was the only meeting at which Provenzano was present.

The government therefore introduced other evidence on the issue of identity. It relied on the testimony of another witness, Ralph Picardo, for that purpose. Picardo was a former associate of Provenzano. He had been taken into the federal witness protection program. He was a man with a checkered past. He had been convicted of murder in a New Jersey state court. That conviction was reversed on appeal. He never was retried.

The government made certain disclosures to the defense regarding Picardo pursuant to *Brady v. Maryland, supra*, and the Jencks Act. The *Brady* material included information that Picardo had been convicted of murder, that his conviction had been reversed, and that he was in the federal witness protection program. The Jencks Act material consisted of Picardo's testimony before the grand jury which returned the instant indictment. Judge Metzner, on motion of the government, entered an ex parte order which permitted the government to withhold the *Brady* and Jencks Act material relating to Picardo until the day before his testimony. Judge Metzner entered this order upon representations by the government that special security measures were necessary for Picardo's protection.[8] The order was not disclosed to the defense until shortly before the argument of the original appeal in our Court.

Despite the information which Provenzano's trial counsel had about Picardo from the government's disclosures and from Provenzano himself, he chose not to cross-examine Picardo.[9] Judge Metzner concluded, in denying the motions for a new trial based on alleged failure to make full disclosure under *Brady* and the Jencks Act, that the defense had waived cross-examination of Picardo as a matter of trial tactics.

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[8] *See* note 27, *infra*, referring to the government affidavit in support of the ex parte order. Judge Metzner transmitted the sealed file, including the ex parte order and the supporting affidavit, to our Court about ten days before the original argument in our Court on October 16, 1978. On the date of that argument, upon application by appellant's counsel, we ordered that the file be unsealed and be made available to appellant's counsel.

[9] Bentro's counsel also chose not to cross-examine Picardo.

The jury returned its verdict convicting Provenzano on March 25, 1978.[10] On July 11, 1978 Judge Metzner sentenced him to four years in prison, the term to be served concurrently with a term of life imprisonment imposed by a New York State court for murder.[11]

From the judgment of conviction of July 11, 1978, the instant appeal has been taken.

II.

In the light of these facts and prior proceedings, we turn directly to the question whether the evidence was sufficient to support appellant's conviction. We hold that it was.

Aside from appellant's general claim that the evidence of his guilt was insufficient to warrant submitting the case to the jury, he asserts two specific claims regarding the evidence of a conspiracy and appellant's connection with it.

First, appellant argues that there was insufficient evidence to establish the alleged object of the conspiracy, namely, to offer or promise a kickback to

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[10]Bentro, Provenzano's co-defendant at trial, also was convicted. *See* note 1, *supra*. He was sentenced to an 18 month term of imprisonment.

[11]Provenzano had been convicted of murder in the County Court of Ulster County, New York, and had been sentenced to life imprisonment on June 21, 1978. Subsequently, and prior to the final argument in the instant case on September 17, 1979, Provenzano's Ulster County Court conviction was reversed and the case was remanded for a new trial. *People v. Provenzano*, ____ A.D.2d ____, 417 N.Y.S.2d 317 (3d Dept. 1979).

DePerno to influence his action as a pension and welfare fund trustee.[12]

It is elemental, of course, that a person "cannot conspire to commit a specific crime unless he is aware of all the elements of the crime," *United States v. DeMarco*, 488 F.2d 828, 832 (2 Cir. 1973).[13] From this, however, it does not follow that in this case the government was required to prove that DePerno either accepted or was offered as a kickback his share of the bonus points.[14] It was sufficient that the government proved that Provenzano knowingly joined the group which *agreed to make* such a payment to DePerno. We are satisfied that the act which constituted the gravamen of the alleged offense of conspiracy—"concert in criminal purposes, rather than concert in crime", *United States v. Krulewitch*, 336 U.S. 440, 447 n.4

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[12]Appellant was convicted of conspiring to violate 18 U.S.C. § 1954 (1976) which, in relevant part, provides:

> "[Any pension or welfare plan trustee who] receives or agrees to receive or solicits [sic] any fee, kickback, commission, gift, loan, money, or thing of value because of or with intent to be influenced with respect to, any of the actions, decisions, or other duties relating to any question or matter concerning such plan or any person who directly or indirectly gives or offers, or promises to give or offer, any fee, kickback, commission, gift, loan, money, or thing of value prohibited by this section, shall be [punished]...."

[13]The *De Marco* court quoted Judge Learned Hand's classic, though simplistic, observation:

> "While one may, for instance, be guilty of running past a traffic light of whose existence one is ignorant, one cannot be guilty of conspiring to run past a light unless one supposes that there is a light to run past." *United States v. Crimmins*, 123 F.2d 271, 273 (2d Cir. 1941).

[14]Since the deal never was consummated, of course De Perno never received his bonus points.

(1949) (Jackson, J., concurring)[15]—was adequately established here.

Accordingly, we hold that there was sufficient evidence from which the jury could find that there was a conspiracy to commit a particular offense and not merely a vague agreement "to do something wrong". *United States v. Rosenblatt*, 554 F.2d 36, 38-40 (2 Cir. 1977); *United States v. Gallishaw*, 428 F.2d 760, 763 (2 Cir. 1970).

Second, appellant argues that his connection with the alleged conspiracy was not established sufficiently to permit the admission of the testimony of the conspirator Goldfarb. In *United States v. Geaney*, 417 F.2d 1116 (2 Cir. 1969) (Friendly, J.), *cert. denied*, 397 U.S. 1028 (1970), we set forth the standard by which the trial judge should determine whether to admit in evidence hearsay statements of a conspirator, namely, whether a "fair preponderance of the evidence independent of the hearsay utterances" has established the participation in the conspiracy of the defendant against whom such hearsay statements are offered. *Id.* at 1120. Put another way:

> "The threshold requirement of admissibility is satisfied by a showing of a likelihood of an illicit association between the declarant and the defendant. . . ." *United States v. Glazer*, 532 F.2d 224, 228 (2 Cir.), *cert. denied*, 429 U.S. 844 (1976), quoting *United States v. Ragland*, 375 F.2d 471, 477 (2 Cir. 1967), *cert. denied*, 390 U.S. 925 (1968).

[15] *Accord, Iannelli v. United States*, 420 U.S. 770, 777 n. 10 (1975):

> "Nonetheless, agreement remains the essential element of the crime, and serves to distinguish conspiracy from aiding and abetting which, although often based on agreement, does not require proof of that fact, ... and from other substantive offenses as well."

At the time the Goldfarb testimony was offered, the evidence had established clearly that Provenzano was involved in efforts to obtain a mortgage loan for the Woodstock. He does not dispute this. The only issue is whether the evidence supports the inference that the loan was to be facilitated by a bribe to DePerno. It is clear, however, that Bentro assured all those present at the July 11 meeting that Provenzano would work matters out with DePerno, and that Bentro, Provenzano and DePerno would share in the bonus points.

Paladino and Goldfarb surely understood that DePerno was to receive a kickback for his efforts. The effect of the statements made by Provenzano at the July 11 meeting, at which the details of the loan were fully discussed, was that he, too, was aware of and had joined the conspiracy. "When, as in this case, the existence of a conspiracy has been shown, evidence sufficient to link another defendant with it need not be overwhelming . . . ." *United States v. Head*, 546 F.2d 6, 9-10 (2 Cir. 1976), *cert. denied*, 430 U.S. 931 (1977).

Accordingly, we hold that Judge Metzner correctly concluded that the *Geaney* test had been complied with and that he properly admitted the Goldfarb testimony.

Finally, as for appellant's general claim that the evidence of his guilt was insufficient to warrant submitting the case to the jury, we disagree.

The standard for making that determination is so well established in this Circuit that we shall not dilate upon it. *United States v. Rivera*, 513 F.2d 519,

528-30 (2 Cir.) (Friendly, J.), *cert. denied*, 423 U.S. 948 (1975); *United States v. Taylor*, 464 F.2d 240 (2 Cir. 1972) (Friendly, J.). As stated in *Rivera, supra*, 513 F.2d at 529, the test is whether

> "upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt' ", quoting *Curley v. United States*, 160 F.2d 229, 232-33 (D.C. Cir.), *cert. denied*, 331 U.S. 837 (1947).

Accord, United States v. Daley, 564 F.2d 645, 652 (2 Cir. 1977), *cert. denied*, 435 U.S. 933 (1978); *United States v. De Garces*, 518 F.2d 1156, 1159 (2 Cir. 1975); *United States v. Freeman*, 498 F.2d 569, 571 (2 Cir. 1974).

In the instant case, on the basis of the facts summarized above, we hold that there was sufficient evidence from which the jury could find—directly and by proper inference—that appellant knowingly participated in the conspiracy. It is a rare case indeed where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel. A conspiracy by its very nature is a secretive operation. Applying the test set forth above, however, we are satisfied that there was sufficient evidence to support the jury's guilty verdict.

III.

We turn next to appellant's claim that the district court erred in its charge to the jury in two respects, namely, in failing to charge specifically that mere association was an insufficient basis upon which to predicate a conspiracy conviction, and in failing to charge

that the testimony of Goldfarb as an informant and perjurer should be examined with special care. We find no merit in either aspect of this claim of error.

First, with respect to the court's failure to give the so-called mere association instruction, we believe that the charge read as a whole made it abundantly clear to the jury that the converse of mere association, i.e. *active participation* with intent to further the objectives of the conspiracy, *was required.* For example, Judge Metzner charged the jury as follows:

> "If you satisfy yourselves beyond a reasonable doubt that the conspiracy as alleged in the indictment existed, then you must determine beyond a reasonable doubt as to each defendant *whether the defendant knowingly and wilfully was an active participant in the unlawful plan with the intention of furthering its objectives.* Mere knowledge by a defendant of an alleged illegal act on the part of some other defendant or alleged co-conspirator is not sufficient. Merely acting in a way which incidentally furthers the purpose of a conspiracy without knowledge that a conspiracy exists does not make a person a member of the conspiracy." (emphasis added).

Appellant cites various cases which he says make the giving of the mere association charge mandatory. We think his reliance on these cases is misplaced under the circumstances of this case. For example, in *United States v. MacDougal-Pena*, 545 F.2d 833, 836 (2 Cir. 1976), the propriety of such a charge was mentioned only by way of dictum, such a charge not having been requested in the trial court. In *United States v. Terrell*,

474 F.2d 872, 876 (2 Cir. 1973), we held that "a *Garguilo* charge" (referred to below) was not required except where the evidence was close. The leading case in this Circuit is *United States v. Garguilo*, 310 F.2d 249 (2 Cir. 1962) (Friendly, J.),[16] where we said:

> "The closeness of the issue against Macchia imposed an obligation on the trial judge to instruct the jury with extreme precision, as he realized, and on us to review the charge with what, in a less doubtful case, would be undue meticulousness. [citations omitted]. Reading the entire charge, we cannot overcome a fear that the judge, quite unwittingly and simply by emphasis, may have had the jury to believe that a finding of presence and knowledge on the part of Macchia was enough for conviction . . . . Never were the jurors told in plain words that mere presence and guilty knowledge on the part of Macchia would not suffice unless they were also convinced beyond a reasonable doubt that Macchia was doing something to forward the crime—*that he was a participant rather than merely a knowing spectator.*" *Id.* at 254 (emphasis added).

The "closeness of the issue against Macchia" finds no counterpart in the instant case. Here appellant was not merely present with the other conspirators at the critical July 11 meeting; he was an active participant with full knowledge of the unlawful plan and

[16] *Terrell* and *Garguilo* were both aiding and abetting cases where the evidence against the appellants in question consisted almost entirely of their presence at the scene of criminal acts performed by the principals.

plainly intended to further its objectives. That is precisely what Judge Metzner charged that the jury must find before it could convict appellant.

Second, with respect to the asserted failure of the court to charge the jury to examine Goldfarb's testimony with special care and caution because he was an informant and perjurer, this claim can be disposed of summarily.[17] Judge Metzner did give the standard charge regarding the jury's exclusive function to determine the credibility of witnesses and the weight and value to be given their testimony. He went further and instructed the jury that Goldfarb was a paid informant whose relationship to the government was a factor which should be considered in evaluating his testimony. Still referring to Goldfarb, the judge told the jury that "Evidence that he has been convicted of a crime may be considered by you in assessing his credibility as a witness and the weight you will give to his testimony." More than that was not required.

We hold that the district court did not err in its charge to the jury in either respect claimed by appellant.

IV.

This brings us to the final question raised on appeal—whether the district court erred in denying appellant's motions for a new trial based on asserted non-compliance by the government with the disclosure requirements

[17] This asserted error in the court's charge to the jury was not raised at all in the trial court by appellant Provenzano. We deal with it here only because Provenzano joined in the arguments raised on appeal by his former co-appellant Bentro. As for Bentro, he did not object in the trial court to the failure to give an informant's charge; he did object to the court's failure to charge that a perjurer's testimony should be considered with caution and weighed with great care.

of *Brady v. Maryland*, 373 U.S. 83 (1963), and the Jencks Act, 18 U.S.C. § 3500 (1976).[18] We hold that it did not.[19]

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[18]The *Brady* issue has received considerable attention by the district court and by us.

After the jury returned its verdict of guilty on March 25, 1978, Provenzano filed a motion for a new trial, pursuant to Fed. R. Crim. P. 33, claiming that the government had failed to disclose *Brady* material and Jencks Act material relating to the government witness Picardo. On June 22, 1978, prior to the imposition of sentence, the district court filed an opinion denying that motion.

Subsequent to the original argument of this appeal on October 16, 1978 and while the case was pending sub judice before us, Provenzano first sought leave to file a supplemental brief and thereafter to supplement the record on appeal by bringing to our attention additional information relating to the *Brady* issues. On May 14, 1979, we denied Provenzano's motion to supplement the record on appeal but remanded the case to the district court to allow Provenzano to move for a new trial based on the ground of newly discovered evidence.

Pursuant to the remand, Provenzano moved for a new trial. On June 26, 1979, the district court filed an opinion denying the motion and again rejecting Provenzano's claims that the undisclosed evidence would have affected the outcome of the trial. From the order entered on that opinion on June 27, 1979, Provenzano filed a further notice of appeal.

On July 13, 1979, we entered an order consolidating all appeals pending in this case; directing the parties to file supplemental briefs limited to the *Brady* issue but combining arguments raised on the initial appeal with those relating to the district court's order of June 27, 1979; and scheduling supplemental oral arguments on September 17, 1979 before the same panel which hear the original appeal. We heard the supplemental arguments on September 17.

By the time of the supplemental arguments on September 17, Bentro was no longer an appellant in the instant case, note 1, *supra*, and Provenzano had been convicted of racketeering in the District of New Jersey and sentenced to a 20 year term of imprisonment. Note 24, *infra*.

[19]A subordinate question raised by Provenzano is whether the district court erred in refusing to hold an evidentiary hearing

(footnote continued on following page)

In *Brady v. Maryland, supra*, 373 U.S. at 87, the Supreme Court held that

> "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is *material* either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." (emphasis added).

Subsequently, in *United States v. Agurs*, 427 U.S. 97 (1976), the Court formulated guidelines for determining whether evidence should be considered "material" for the purpose of invoking the *Brady* rule. When the prosecution is or should be aware that it is presenting perjured testimony, a strict standard of materiality must be applied. Thus, a defendant's conviction will be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *Id.* at 103; *see Napue v. Illinois*, 360 U.S. 264 (1959); *Mooney v. Holohan*, 294 U.S. 103 (1935). There is no claim of perjured testimony in the instant case.

This strict standard of materiality also is applied when a defendant has made a *specific* request for information that is withheld by the government. In such cases, as in cases involving perjury, the defendant is entitled to a new trial if there is any reasonable likelihood that the evidence could have affected the outcome

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(Footnote continued from preceding page)

on his motions for a new trial for the purpose of determining whether the withholding of information was negligent or deliberate. *United States v. Morell*, 524 F.2d 550 (2 Cir. 1975). We do not reach this question. The inquiry to which such a hearing might have been directed strikes us as not germane in light of the Supreme Court's decision in *United States v. Agurs*, 427 U.S. 97 (1976), where the Court stated that "[i]f the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." *Id.* at 110.

of the trial. *United States v. Agurs, supra*, 427 U.S. at 104-06; *Ostrer v. United States*, 577 F.2d 782, 786 (2 Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). Finally, there are those cases in which the defendant has made *no request* for the undisclosed information, or only a *general request*. In such instances, the defendant is entitled to a new trial only if the undisclosed evidence, viewed in the context of the entire record, creates a reasonable doubt as to his guilt. *United States v. Agurs, supra*, 427 U.S. at 112-13; *Ostrer v. United States, supra*.

The information which was not disclosed to the defense in this case relates solely to the motivation of a single government witness, Ralph Picardo. Picardo's testimony at trial was used to help identify Provenzano's voice on a tape recording.[20] The testimony did not otherwise bear upon the evidence of Provenzano's illegal activities, or the details of the "workup" of the Woodstock mortgage.

Provenzano initially contended that the government violated *Brady* by failing to disclose the following information: (1) the circumstances surrounding the federal government's removal of Picardo from the Trenton (New Jersey) State Prison where he was incarcerated on his murder conviction; (2) the federal government's involvement in obtaining bail for Picardo pending his appeal of that conviction; (3) the federal government's intervention with the New Jersey appellate

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[20]Moreover, it appears that the jury itself could have concluded that the voice was that of Provenzano, based in part on Goldfarb's grand jury testimony to that fact, which the trial jury heard, and in part on the tapes, which the trial jury also heard.

courts to keep alive Picardo's appeal from his murder conviction; (4) the federal government's intervention which might have led to the state's decision not to retry Picardo on the murder charge; (5) the federal government's involvement in obtaining the dismissal of a larceny indictment against Picardo; and (6) Picardo's mental and physical health records. Provenzano also contended that he was not given Jencks Act material consisting of the transcript of an earlier appearance by Picardo before a grand jury investigating unrelated charges and the transcript of an interview with the FBI.

Subsequently Provenzano supplemented his list of undisclosed *Brady* material by adding the following: (1) government promises to Picardo of executive clemency if he were convicted again on the reversed murder charge; (2) promises of immunity to Picardo in return for his cooperation with New Jersey authorities; (3) Picardo's escape from a Maine prison facility; (4) Picardo's history of prior criminal conduct; (5) conflicting statements made by Picardo to government officials concerning Provenzano's activities; (6) discussions by Picardo about illegal methods of overturning his conviction; and (7) attempts by Picardo to tamper with a jury in his own case. Provenzano also contended that additional Jencks Act material had been withheld.

There is some dispute on this appeal over whether the above listed material was the subject of *specific* defense requests for production and therefore is reviewable under the strict *Agurs* standard of materiality.[21]

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[21]Judge Metzner assumed, for purposes of his ruling on the first motion for a new trial, that there had been a specific request for the *Brady* material. The government contends that the material involved on the first motion was never the subject of a specific request. The government concedes, however, that the *Brady* material involved on the second motion had been requested specifically.

There also is some dispute over how much of the material in fact was producible under *Brady*—indeed, whether some of the material existed at all.[22]

After careful consideration of the contentions of both sides, we find that resolution of these disputes is unnecessary to the proper disposition of this appeal. We assume arguendo that all of the material sought by the defense was the subject of specific requests for production and was properly producible by the government. We conclude that there is no reasonable likelihood that the undisclosed evidence would have affected the outcome of the trial and Provenzano was not denied due process by the government's failure to produce

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[22]For example, the claim that federal officials had intervened to prevent a retrial of Picardo's murder case was based on a newspaper report. In support of this claim, Provenzano stated only that Picardo was "whisked" out of the Trenton State Prison. The claim that the government had helped obtain the dismissal of Picardo's state larceny charges is based solely on the fact that a Special United States Attorney was with Picardo when the charges were dropped. Provenzano claims that the government did not disclose that Picardo had used drugs, had tampered with a jury, and had discussed illegal methods of overturning his murder conviction. The government, however, submitted uncontradicted affidavits from prosecutors that Picardo never had revealed such information to them. The government also challenges appellant's claims that the "newly-disclosed" information used in Provenzano's New Jersey racketeering trial, *see* note 24, *infra*, is in fact *Brady* material. These claims relate to asserted improvements in Picardo's custodial status, "management problems" in connection with the witness protection program, and other government assistance to Picardo. The government contends that these matters do not constitute benefits to Picardo.

With respect to the defense claim that Picardo's physical and mental health records were withheld, the defense never made any showing as to how these records could be used to discredit Picardo's testimony.

the material. We reach this conclusion because we are satisfied that the defense never would have used this undisclosed evidence to impeach Picardo.

Provenzano's experienced trial counsel chose *not* to cross-examine Picardo after the latter gave direct testimony identifying Provenzano's voice on tape recorded conversations. In denying Provenzano's motions for a new trial, Judge Metzner found that the defense decision not to cross-examine Picardo was a tactical one which would not have been affected by the disclosure of additional *Brady* material. He concluded that the withholding of the *Brady* material had no effect whatsoever on the conduct of the trial—let alone its outcome; defense counsel would not have cross-examined Picardo under any circumstances, for reasons discussed below. We agree.

Even if we did not agree with the trial judge's assessment of the situation, we still would not reverse his determination except upon a far more compelling showing than is presented by this record. After all, Judge Metzner was at the trial. We were not. He obviously was in the best position to appraise the possible effect of the *Brady* material. His conclusion that the outcome of the trial was not affected by its non-disclosure is entitled to great weight. *United States v. Sternstein*, 596 F.2d 528, 531 (2 Cir. 1978). In the instant case, moreover, there is substantial support in the record for the trial judge's view. We are in full agreement with it. Our independent examination of the role played by Picardo as a witness, the impeachment material that the government *did* disclose to Provenzano, and the nature and potential use of the undisclosed material leads us likewise to the conclusion that the outcome of the trial would not have been changed by the disclosure of the additional *Brady* material.

Picardo's testimony at trial was limited solely to the identification of voices on a tape recording. Although Picardo's voice identifications were important, there was other substantial evidence that supported the jury's finding

of guilt. Indeed, there was other evidence which identified Provenzano's voice on the tape.[23] Because of Picardo's limited role as a witness at trial,[24] it is understandable that counsel for Provenzano would refrain from cross-examining Picardo if there was any likelihood that such cross-examination would open the door for additional, damaging testimony beyond the limited scope of the witness' direct testimony. Keeping the door closed to such additional testimony is exactly what occurred.

There were two aspects of Picardo's background which defense counsel understandably would try to avoid at trial. First, they would be expected to avoid Picardo's past criminal activities. The jury knew of Provenzano's close association with Picardo. To apprise the jury of the sordid nature of Picardo's background would result in spillover prejudice to Provenzano far outstripping the impeachment value of such evidence with respect to Picardo.[25] Second, at the time of trial Picardo was enrolled in the federal witness protection program. It was important for the defense to try to keep this information from the jury, lest the jury infer or even be told, that Picardo was receiving this protection out of fear of Provenzano.

Before Picardo took the witness stand, Provenzano's counsel was informed by the government that Picardo had been convicted of murder, that the conviction had been reversed on appeal, and that Picardo was receiving benefits

[23] *See* note 20, *supra*.

[24] The instant case is readily distinguishable from the later racketeering trial of Provenzano in the District of New Jersey. In the New Jersey trial, Provenzano did use some of the undisclosed impeachment material to cross-examine Picardo. But Picardo was a central witness in that case. His testimony was not limited as it was here. Provenzano was convicted in that trial, despite the use of the disclosed *Brady* material. On July 10, 1979 he was sentenced to a 20 year term of imprisonment. He is currently serving that sentence.

[25] At trial, defense counsel expressed this fear in attempting to prevent Picardo from testifying at all. It is undisputed that some of Picardo's past criminal activities directly involved Provenzano.

from the government as part of the witness protection program. Armed with this limited *Brady* material, defense counsel chose not to cross-examine Picardo, having concluded that the risk of harm to Provenzano inherent in such crossexamination outweighed any possible benefit from trying to impeach Picardo. This risk of harm in opening the door for prejudicial testimony from Picardo would have outweighed the benefit of cross-examination even if all the *Brady* material had been disclosed at trial.

The undisclosed *Brady* material, which Provenzano now claims he would have used to impeach Picardo, falls into the two categories mentioned above—Picardo's prior criminal conduct and benefits conferred upon Picardo by the government. Counsel knew that Picardo had once been convicted of murder (although this conviction had been reversed on appeal), and chose not to cross-examine him. It is unlikely that knowledge of lesser acts of criminal conduct, which were not even the subject of a conviction, would have resulted in such cross-examination. Moreover, as stated above, defense counsel surely did not want the jury to hover upon Provenzano's association with a person of Picardo's shady background. It therefore is most unlikely that defense counsel would have focused the jury's attention on Picardo's past criminal conduct through cross-examination of him.

The government benefits received by Picardo likewise would have inhibited defense counsel in cross-examining Picardo. Any inquiry into such benefits inevitably would have led to damaging testimony from Picardo beyond the scope of his direct examination. Questions about Picardo's removal from the Trenton State Prison or his freedom on bail pending appeal,

for example, undoubtedly would have resulted in answers reflecting his concern for his safety.[26] Questions concerning promises of executive clemency, use immunity, or aid in obtaining parole would have focused the jury's attention on Picardo's criminal background and further risked eliciting testimony from Picardo concerning past crimes involving Provenzano.

In short, all of the *Brady* material involving government benefits to Picardo, which Provenzano now claims would have been used to cross-examine Picardo, was linked either to Picardo's past crimes or to his participation in the witness protection program. Any reference to such material would have been crippling to Provenzano's defense. That is why counsel for Provenzano chose not to cross-examine Picardo in the first place. Considering the limited extent of Picardo's direct testimony, it is understandable that experienced defense counsel chose to ignore the witness rather than open the door to new, highly damaging testimony. If defense counsel in fact had wanted to show motive or bias on Picardo's part, the *Brady* material which was disclosed to them would have permitted them to do so.

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[26]In an affidavit sworn to March 1, 1978, in support of the ex parte order sought by the government, Steven K. Frankel, an Assistant United States Attorney, stated that Picardo had been threatened by Provenzano in 1975 over an unrealted matter; that Picardo had been warned by associates that Provenzano had let a "contract" for his death; that the government had reliable information in December 1977 as to the identity of the individual who had accepted the contract; that an associate of Provenzano had asked Picardo whether he would be testifying at the trial, although there should have been no reason for him to suspect that; that Picardo's brother had been contacted by Provenzano's associates in an effort to locate Picardo; and that the location of Picardo's wife and children might be known to the individual trying to carry out the contract to execute Picardo. As a result, Frankel stated, "a grave security problem for Picardo and his family arises once Picardo's identity as a witness in this case becomes known."

But defense counsel, wisely in our view, steered clear of the potential landmines.

We wish to make it clear that our decision on the *Brady* issue here turns on the unique facts of this case. We recognize that courts should not lightly infer that undisclosed *Brady* material would not have been used by the defense. Nevertheless, in view of all the circumstances of this case, we certainly agree with the trial judge that the defense decision not to cross-examine Picardo would not have been changed by the disclosure of additional *Brady* material. Therefore, even applying the strict standard of materiality to the undisclosed *Brady* material here in question, we hold that Provenzano was not denied a fair trial.[27]

We have carefully considered all of appellant's claims of error and find that they are without merit. Appellant was convicted after a fair trial on the basis of substantial evidence of a serious crime committed more than five years ago.

Affirmed.

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[27]Appellant's claims with regard to the Jencks Act may be disposed of summarily. Like the *Brady* material, we do not believe that the Jencks Act material allegedly withheld would have been used to cross-examine Picardo. Furthermore, Judge Metzner concluded, after an in camera examination of the grand jury transcript which was not given to the defense, that everything it contained also was in the transcript they did receive. The claim that the government failed to disclose notes of an interview with Picardo in an unrelated matter is without merit; indeed, it appears that these notes probably do not exist. Finally, the claim of non-disclosure of notes relating to the Woodstock deal is wholly without merit. Such notes on their face do not relate to the Woodstock deal. Even if they did, they did not have to be produced since the subject matter of Picardo's direct testimony did not refer in any way to the Woodstock deal.

Appendix D

Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing En Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
78-1099

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventeenth day of March, one thousand nine hundred and eighty.

Present: HONORABLE HENRY J. FRIENDLY

HONORABLE WILLIAM H. TIMBERS

HONORABLE ELLSWORTH VANGRAAFEILAND

Circuit Judges.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY PROVENZANO,
Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the Appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is DENIED.

A. DANIEL FUSARO
Clerk

Appendix D

Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing En Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT
78-1099

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the seventeenth day of March, one thousand nine hundred and eighty.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ANTHONY PROVENZANO,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the Appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

/s/ Irving R. Kaufman
Chief Judge
IRVING R. KAUFMAN